AMICUS BRIEF

BRIEF FOR NATURAL RESOURCES DEFENSE COUNCIL AS AMICI CURIAE SUPPORTING RESPONDENT, UNITED STATES V. ATLANTIC RESEARCH CORP., NO. 06-562 (U.S. APR. 5, 2007)

BY

CRAIG JOHNSTON*

The Supreme Court's resolution of United States v. Atlantic Research Corp. will have a huge impact on the future scope and effect of the Superfund program. For more than 25 years, private parties have assumed that if they clean up contamination on their properties, they can use the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund") to spread at least some portion of the relevant costs among others who may have played a role in causing the relevant contamination. The courts have nearly universally supported this position.

In Atlantic Research*, the Government argues that those who themselves bear potential liability at a given site cannot use § 107(a)(4)(B) of the statute to seek from others the recovery of even a portion of their cleanup costs. If the Supreme Court upholds this position, it will drastically change the operation of the Superfund program, essentially limiting its effect to sites that are so contaminated as to warrant EPA involvement. This would mean that many fewer*

* Professor of Law, Lewis & Clark Law School; B.A. 1978 University of Rochester, J.D., magna cum laude, 1985 Lewis & Clark Law School. Because Prof. Johnston is not currently an active member of the Oregon bar, he could not be the counsel of record on this brief. While Mr. Phillips reviewed the brief before it was filed, Prof. Johnston was its sole author. The author would like to thank Jamie Saul, Ellen Trescott, Dan Mensher, and Allison LaPlante for their outstanding research assistance. Additionally, he would like to thank Nancy Marks, Joel Gross, Albert Cohen, Michael Wall, and Professors Martha Judy, Nina Mendelson, and Bill Funk for their outstanding comments on prior drafts.

contaminated sites would be cleaned up. Additionally, it would mean that those who do undertake cleanup activities will bear disproportionate responsibility, while others get off scot-free, thus undermining the "polluter pays" principle.

No. 06-562

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE
NATURAL RESOURCES DEFENSE COUNCIL,
PROF. CRAIG N. JOHNSTON,
PROF. WILLIAM F. FUNK,
PROF. MARTHA L. JUDY
PROF. NINA A. MENDELSON,
PROF. JEFFREY G. MILLER,
PROF. PATRICK A. PARENTEAU, AND
PROF. ZYGMUNT J.B. PLATER
IN SUPPORT OF RESPONDENT

Jerry S. Phillips
Counsel of Record
Loeb & Loeb LLP
10100 Santa Monica Boulevard, Suite 2200
Los Angeles, CA 90067-4120
(310) 282-2228

TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE

Amici Curiae are a national environmental organization and seven law professors. The Natural Resources Defense Council, which has 1.2 million members and supporters, uses law and science in an effort ensure a safe and healthy environment for all living things. The *amici* law professors are teachers and students of environmental law, and have a longstanding interest in the Superfund program established by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

The *amici* believe this case presents an important opportunity for this Court to affirm the right of private parties to recover cleanup costs under CERCLA. *Amici* are concerned that, if accepted by the Court, the Government's interpretation would undermine CERCLA's goals of promoting the expeditious cleanup of contaminated sites and ensuring that those responsible bear their share of any resulting cleanup costs. *Amici* believe the Government's interpretation would result in both fewer cleanups and inequitable burdens on those who do step forward.

A further description of the *amici* is set forth in an Appendix to this brief.[1]

[1] The parties' written consents to the filing of this brief are being submitted to the Clerk of this Court. Pursuant to S.Ct.R. 37.6, *amici* affirm that this brief was not authored in whole or in part by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person other than *amici* or their counsel.

SUMMARY OF THE ARGUMENT

When Congress first enacted CERCLA in 1980, it provided two different categories of plaintiffs with causes of action to recover costs incurred in cleanup efforts. First, Section 107(a)(4)(A) provided the United States, States, and Indian tribes with the authority to sue those deemed responsible under § 107(a) (often referred to as "potentially responsible parties" or "PRPs") to recover costs "not inconsistent with" a document known as the National Contingency Plan ("NCP"). 42 U.S.C. § 9607(a)(4)(A).[2] And second, Section 107(a)(4)(B) gave "other person[s]" that same authority, with the difference that these persons are required to demonstrate that their cleanups are "necessary" and "consistent with" the NCP. 42 U.S.C. § 9607(a)(4)(B).

Congress has amended CERCLA comprehensively only once, though the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, Oct. 17, 1986, 100 Stat. 1615. Before SARA was passed, the courts unanimously had recognized that § 107(a)(4)(B) creates a right of cost recovery in those private parties who cleaned up sites without having first been sued by the Government, regardless of any potential liability they themselves may have borne under the statute. *See*, *e.g., Wickland Oil Terminals v. Asarco, Inc.,* 792 F.2d 887, 890–892 (9th Cir. 1986) ("*Wickland*"). There was less agreement, however, regarding the availability of contribution rights for those who, in response to a lawsuit, had either undertaken cleanup measures or reimbursed the Government for its cleanup costs. *Compare*, *e.g.*, *Colorado v. ASARCO, Inc.,* 608 F.Supp. 1484, 1486–1493 (D.Colo. 1985) (finding a federal common law right of contribution), and *Wehner v. Syntex Agribusiness, Inc.,* 616 F.Supp. 27, 31 (E.D.Mo. 1985) (contribution right implied in § 107(e)(2)), with *United States v. Westinghouse Elec. Corp.*, No. IP 83-9-C, 1983 WL 160587 (S.D. Ind. 1983) (no right of contribution).

Congress acted against this backdrop in 1986. In passing SARA, Congress left § 107(a)(4)(B) unaltered, preserving the private right of cost recovery. It did, however, move to solidify the contribution rights of two groups of parties. First, in § 113(f)(1) it created an express right of contribution in those who either had been or were being sued under either § 106 or § 107 of CERCLA. 42 U.S.C. § 9613(f)(1). Additionally, in § 113(f)(3)(B), Congress did the same with respect those who had entered into settlements with either the United States or a State. 42 U.S.C. § 9613(f)(3)(B).

In the wake of SARA, but before this Court's decision in *Cooper Industries, Inc., v. Aviall Services, Inc.*, 543 U.S. 157 (2004) ("*Cooper Industries*"), the lower courts took a wrong turn. As the court below noted, the lower courts began "directing traffic" between §§ 107 and 113(f),

[2] The Government refers to the key statutory subsections in this case as § 107(a)(1)-(4)(A) and 107(a)(1)-(4)(B). While we agree that all of the liable parties referenced in subsections (1)-(4) are responsible for the costs specified in subclauses (A) and (B), we refer to these provisions as (a)(4)(A) and (a)(4)(B) to maintain consistency with this Court's usage *Cooper Industries, Inc., v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

generally steering CERCLA plaintiffs who bore potential liability away from cost recovery in favor of the contribution-based remedies available under § 113(f). *Atlantic Research Corp. v. United States,* 459 F.3d 827, 832 (8th Cir. 2006) ("*Atlantic Research*"). In some cases, this was justifiable, as parties who had been given contribution claims under § 113(f) tried to avoid some of that subsection's more restrictive dynamics by availing themselves of the more favorable dynamics of § 107(a)(4)(B). *See*, *e.g., United Technologies Corp. v. Browning-Ferris Indus., Inc.,* 33 F.3d 96, (1st Cir. 1994) (involving a plaintiff who had entered into a consent decree with EPA, but sought to use § 107(a)(4)(B) due to its more permissive statute of limitations). In other cases, however, the courts erred by steering parties to contribution-based remedies despite the fact that they had valid claims under § 107(a)(4)(B), but invalid claims under § 113(f). *See*, *e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) ("*Pinal Creek*") (involving plaintiffs who had cleaned up a site without being subjected to any lawsuit or administrative edict).[3]

The courts provided three main rationales for steering parties toward § 113(f). First, they expressed concern about the circumvention of § 113(f), often without analyzing whether that section even applied; second, they were of the view that any application of § 107(a)(4)(B) would result in the plaintiff being able to impose all of the relevant cleanup costs on the defendants under principles of joint and several liability; and third, many deemed the plaintiffs' claims to be "quintessential" claims for contribution, *See*, *e.g.*, *Bedford Affiliates v. Sills*, 156 F.3d 416, 423–424 (2d Cir. 1998) ("*Bedford Affiliates*") (identifying all three concerns). As demonstrated below, the first and third of these rationales are misplaced in contexts in which the plaintiff has not been subjected to a lawsuit. The second is simply incorrect.

Despite the courts' reluctance to apply § 107(a)(4)(B) on behalf of those who themselves bore potential liability under CERCLA, none of the pre-*Cooper Industries* courts denied the plaintiffs a claim. Even in the absence of a prior or pending CERCLA action, every Circuit addressing the issue held that potentially-liable plaintiffs had either an express contribution claim under § 113(f) or an implied contribution claim either under § 107 itself or

[3] There are six categories of plaintiffs who may seek to rely on CERCLA to impose some or all of their cleanup costs on others: (1) those who bear no potential liability under § 107; (2) those who either are being or have been sued under CERCLA; (3) those who have entered into an administrative settlement with either EPA or a State; (4) those who "voluntarily" clean up sites (meaning that they do so without any lawsuit or legally-binding administrative edict); (5) those who remediate sites pursuant to EPA-issued unilateral orders under § 106 of CERCLA; and (6) those who either are being or have been sued under State law, or have cleaned up a site pursuant to either a State-issued unilateral order or some other mechanism that does not meet the requirements of § 113(f)(3)(B). The Government's view is apparently that only those in the first three of these categories may use CERCLA to spread some portion of their cleanup costs onto others who are liable under § 107(a), with those in the first category having claims under § 107(a)(4)(B) and those in the latter two having claims under § 113(f)(1) and (f)(3), respectively. According to this view, those in the latter three categories have no remedy under CERCLA. This case involves a voluntary cleanup.

some combination of §§ 107 and 113(f).[4] Indeed, during this period even the Government took the position that potentially-liable plaintiffs had claims absent a prior or pending lawsuit; it argued that these claims arose through a combined effect of §§ 107(a) and 113(f). *See*, *e.g.*, *Centerior Service Co. v. Acme Scrap Metal Corp.*, 153 F.3d 344, 350 (6th Cir. 1998) ("*Centerior*"). Thus, neither the courts nor the Government questioned whether the plaintiffs were entitled to relief; rather, they merely considered which provision (or provisions) of CERCLA provided the best basis for relief.

In *Cooper Industries*, this Court held that § 113(f)(1) does not provide a contribution claim if the would-be plaintiff is not being or has not been sued under CERCLA. 543 U.S. at 168. This leaves the question presented in this case: whether one who may bear partial responsibility for a contaminated site, but who cleans it up before being sued or otherwise compelled to do so, may sue other potentially liable parties for either cost recovery under § 107(a)(4)(B) or implied contribution under § 107. The better view is that such a party may sue for cost recovery under § 107(a)(4)(B).

ARGUMENT

1. The Plain Language of CERCLA Provides Private Parties with a Cost-Recovery Claim

Section 107(a) identifies four categories of liable parties, including (1) the owner and operator of the relevant facility; (2) anyone who owned or operated the facility when the disposal occurred; (3) anyone who "arranged for disposal" of hazardous substances at the site; and (4) transporters who chose the site as the destination for the waste. It further provides that, subject to an exclusive list of defenses, these parties "shall be liable for-

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> [and]
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . ."

[4] *See*, *e.g.*, *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-424 (2d Cir. 1998) (plaintiff who had entered into an informal agreement with the State had a claim under § 113(f)(1)); *Pneumo Abex Corp. v. High Point, Thomasville and Denton Railroad Co.*, 142 F.3d 769, 776 (4th Cir. 1998) (plaintiff who received unilateral orders from both the state and EPA could proceed under § 113); *Centerior Service Co. v. Acme Scrap Metal Corp.*, 153 F.3d 344, 352 (6th Cir. 1998) (unilateral order recipient had a claim under the combined effect of §§ 107(a) and 113(f)); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994) (unilateral order recipient had claim under § 113(f)(1)); *Pinal Creek*, *supra*, 118 F.3d at 1301-1302 (one who engages in a voluntary cleanup has a claim under a combination of §§ 107(a) and 113(f)); *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1190-1191 (10th Cir. 1997) (same as *Centerior*).

Thus, § 107(a) creates causes of action for cost recovery in two separate groups of parties. First, § 107(a)(4)(A) creates a cost-recovery claim in the United States, the States, and Indian tribes ("the Sovereigns"). Section 107(a)(4)(B) creates a similar cost-recovery claim, with a slightly different burden of proof, in "other person[s]." In *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) ("*Key Tronic*"), this Court recognized that the purpose of this latter clause is "to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Id.* at 819, n.13.

As the Seventh Circuit pointed out in *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007) ("*Metropolitan Water*"), the phrase "other person" in §107(a)(4)(B) is used to distinguish between private parties (and others such as non-profits and municipalities) and the Sovereigns addressed in the preceding clause:

> . . . [W]e read "other" as distinguishing "any other person" from the [the Sovereigns] listed in the immediately preceding subsection. These parties, as subsection (A) states, may recover costs "*not inconsistent* with the national contingency plan." By contrast, "any other person" is limited to recovery of those costs "*consistent* with the national contingency plan." Thus, we read the two subsections, and the reference to "any other person," simply as the statute's way of relaxing the burden of proof for governmental entities, as opposed to private parties.

473 F.3d at 835 (citations omitted) (emphasis in original).[5] Other courts long have recognized that this was Congress's purpose in differentiating between the two groups of parties in § 107(a)(4)(A) and (B). *See*, *e.g.*, *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 747–748 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *see also Ohm Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1579 (5th Cir. 1997) ("the combination of these two clauses in section 107 evidences congressional intent that anyone is eligible to recover response costs").

The juxtaposition between the Sovereigns authorized to sue under § 107(a)(4)(A) and the "other person[s]" who can bring suit under § 107(a)(4)(B) is underscored by the structure of the relevant subsections. Subsection (a)(4)(A) states that PRPs are liable for "*all costs of removal or remedial action incurred by* the [the Sovereigns] not inconsistent with the [NCP]." 42 U.S.C. § 9607(a)(4)(A) (emphasis added). Subsection (a)(4)(B) makes those same PRPs liable for "*any other necessary costs of response incurred by* any other person consistent with the [NCP]." *Id.* § 9607(a)(4)(B) (emphasis added). The first "other" in § 107(a)(4)(B) ("other necessary costs") distinguishes the costs referred to from those specified in § 107(a)(4)(A) ("all costs of removal or remedial action incurred by [the

[5] *See also Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936, n.9 (8th Cir. 1995), and *Pinal Creek*, 118 F.3d at 1301 (concluding that a PRP can qualify as "any other person" under § 107(a)(4)(B)).

Sovereigns]"). If the first "other" relates back to subparagraph (A), then as a matter of parallelism, the most natural reading of the second "other" is that it also relates back to subparagraph (A), and thus describes any person "other" than the Sovereigns.

The symmetry between the two relevant clauses also exists at a more general level. Both create causes of action, albeit in different sets of parties, with the potential defendants being named before the plaintiffs.[6] Both refer to the same categories of costs,[7] and both use the same passive verb formulation, "incurred by." The structural parallelism of the two clauses is complete, strongly suggesting that they should be construed by reference to each other.

The natural understanding of the "any other person" language in § 107(a)(4)(B) is further underscored by the use of the phrase "other person" in § 111(a) of CERCLA. There, the statute speaks to the uses to which monies in the Hazardous Substance Superfund ("Fund") may be put. Subsection 111(a)(1) specifies that these monies may be used for the "[p]ayment of governmental response costs incurred pursuant to [§ 104]." 42 U.S.C. § 9611(a)(1).[8] By contrast, § 111(a)(2) provides that these funds may also be made available for costs incurred by "any other person," so long as the costs are approved the responsible Federal official. 42 U.S.C. § 9611(a)(2). Here again, as in § 107(a)(4), the contrast is between governmental entities and "other person[s]." Here also, there is zero indication that the phrase "other person" is meant to exclude anyone other than the governmental entities covered under the prior provision.[9]

The Government's reading of § 107(a)(4)(B) also errs in presuming liability where none has been established. In this case, as would be true in all cases in which private plaintiffs have no claims under § 113(f), the Respondent had not been determined to bear liability under § 107 through any judicial or administrative process prior to the filing of its complaint.[10]

---

[6] In *Key Tronic*, the members of this Court disagreed on how to characterize the nature of the § 107(a)(4)(B) claim. The majority, while noting that § 107 "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs," deemed the claim to be implied rather than explicit. 511 U.S. at 818. In dissent, Justices Scalia, Blackmun and Thomas deemed the cause of action to be express, not implied. 511 U.S. at 822. The key point is not whether the private-party cause of action is implied or express, but rather that structurally it is set out in the exact same fashion as are the claims of the Sovereigns under § 107(a)(4)(A).

[7] As this Court noted in *Key Tronic*, § 101(25) defines the term "response" to include both removal and remedial action. 511 U.S. at 813. Thus, there is no difference between "costs of removal or remedial action" and "costs of response."

[8] This reference to "governmental response costs" includes not only costs incurred by EPA, but also by States and tribes, as they may have access to Fund dollars under § 104(d)). *See* 42 U.S.C. § 9604(d).

[9] Indeed, Congress acted on the assumption that PRPs are "other person[s]" under this language when it enacted § 106(b)(2)(D), in which it provided that even those unilateral-order recipients who prove to be liable under § 107 are sometimes entitled to reimbursement from the Fund after they comply with those orders. 42 U.S.C. § 9606(b)(2)(D).

[10] The only arguable exception to this statement is in the context of unilateral orders under § 106. Even in that context, however, EPA's liability determination is non-binding. *See* 42 U.S.C. § 9606(b)(2)(C) (entitling the recipient of such an order to *de novo* review of its liability in the

Instead, it "voluntarily investigated and cleaned up the contamination," before any agency compelled it to do so. *Atlantic Research*, 459 F.3d at 829. Nothing in either CERCLA or any other law required it to self-identify as a liable party at the time it filed its complaint. Thus, both the United States and the district court should have treated the Respondent as an innocent party until its liability was both pleaded and established. *See Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.,* 423 F.3d 90, 97 n.8 (2d Cir. 2005) ("*Consolidated Edison*") (declining to refer to the plaintiff as a "PRP" because that might "confer on a party that has not been held liable a legal status that it should not bear"). Put another way, the defendant in a cost-recovery action should bear the burdens of both pleading and proof with respect to the plaintiff's potential liability.[11]

The infirmity of the Government's interpretation of the "other person" language is further highlighted when one considers how inconsequential it would have rendered § 107(a)(4)(B) when first promulgated. The vast majority of private party actions under CERCLA are brought by those who own or do business on the property they are cleaning up.[12] When CERCLA was first passed, however, virtually all those who owned and operated contaminated sites bore liability. Starting with the Second Circuit's seminal decision in *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), the courts universally interpreted § 107(a)(1) as imposing strict liability on current owners and operators, without regard to causation.[13] Moreover, Congress did not create the "innocent landowner defense" until it passed SARA in 1986. *See* 42 U.S.C. § 9601(35). Until then, it was impossible for one who acquired property from a contaminator to assert a defense.[14]

district court after complying with the order).

[11] This, of course, is consistent with how tort law deals with the issue of the plaintiff's potential role in contributing to its own injuries; that is, the defendant generally bears the burden of both pleading and proof with respect to defenses such as contributory and comparative negligence. Dobbs, The Law of Torts, § 198, p. 493 (West, 2000). CERCLA contains a ready mechanism by which a defendant can raise the plaintiff's potential liability and thereby seek to avoid joint and several liability. *See*, *infra*, text accompanying nn. 30-32.

[12] In preparation for writing this brief, we reviewed all CERCLA decisions appearing in Westlaw decided between the years 1995 and 2000. In reviewing these decisions, which involved 364 contaminated sites, we identified 210 cases that would not meet the requirements of § 113(f). Of those, all but one appeared to involve a plaintiff that would qualify as either an owner or an operator under § 107(a). *But see Ohm Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997) (brought by a cleanup contractor).

[13] *Shore Realty* is the single most-cited CERCLA decision. According to Westlaw (as of a search conducted on March 15, 2007), it has been cited 466 times, including twice by this Court (in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

[14] This is because § 107(b)(3) requires one asserting the "third party defense" under the statute to show that the third party's actions did not occur "in connection with" a "contractual relationship" with the person asserting the defense. Although the pre-SARA version of CERCLA did not define the term "contractual relationship," *compare* 42 U.S.C. § 9601(35), the very fact that Congress carved out an "innocent landowner defense" in 1986 suggests that Congress thought that these landowners would otherwise be responsible for contamination caused by their predecessors in title. *See United States v. Hooker Chemicals & Plastics Corp.*, 680 F.Supp. 546 (W.D.N.Y. 1988).

The United States references three types of plaintiffs who might be able to bring claims under its reading of § 107(a)(4)(B): those who own land upon which third parties spill waste, those whose land is contaminated by wastes migrating from upgradient properties, and "bona fide prospective purchasers" under §§ 101(40) and 107(r)(1). Brief for the United States ("U.S. Brief"), at 16. In terms of trying to understand what Congress was trying to achieve in 1980, this last category can summarily be dismissed; it simply didn't exist until Congress passed the Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. 107-118, Jan. 11, 2002, 115 Stat. 2356 (creating what are now CERCLA §§ 101(40) and 107(r)(1)).

The Government's argument is also problematic with regard to the first two categories of landowners it identifies. Both would be presumptively liable as current owners under CERCLA, in that, if they were sued, the plaintiff would be able to make out its prima facie case merely by showing that they owned the property upon which hazardous substances had come to be located; in order to defeat this liability, these landowners would bear the burden of showing they met the requirements of the "third-party defense" under § 107(b)(3). 42 U.S.C. § 9607(b)(3).[15] The Government never explains how a plaintiff is to establish that it meets this defense at the time it files its complaint, thus entitling it to proceed under the Government's cramped view of § 107(a)(4)(B).[16]

The Government's interpretation of § 107(a)(4)(B), which it apparently arrived at only recently,[17] is also flatly inconsistent with the Government's long-held interpretation of the "any other person" language and the significance of the juxtaposition between § 107(a)(4)(A) and (B). *See*, *e.g.*, 55 Fed. Reg. 8666, 8792 (March 8, 1990) (preamble to the NCP) (noting that

---

[15] *See* CERCLA §§ 101(14) (definition of "facility") and 107(a)(1) (imposing liability on the current owner), 42 U.S.C. §§ 9601(14) and 9607(a)(1); *see also Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994). Interestingly, the Seventh Circuit later embraced a hybrid approach to the applicability of § 107(a)(4)(B), indicating that those who are "blameless" (in the sense that they did not contribute to the contamination) may bring claims thereunder even if they are liable under § 107(a) and unable to establish a defense under § 107(b). *See*, *e.g.*, *Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1239-1241 (7th Cir. 1997) ("*Rumpke*"). While the Government does not advocate this position, we note that it has no textual support. Moreover, three other Circuits have rejected it. *Bedford Affiliates*, 156 F.3d at 424-425; *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1134-1135 (10th Cir. 2002); and *Western Properties Service Corp. v. Shell Oil Co.*, 358 F.3d 678, 689-690 (9th Cir. 2004).

[16] It may be that the Government expects a landowner plaintiff to file its claim under § 107(a)(4)(B), and then have it either be dismissed (if the defendant establishes the plaintiff's liability and the plaintiff does not establish a defense) or allowed to go forward (if the defendant either fails to establish the plaintiff's liability or the plaintiff establishes a defense). *Cf. Rumpke*, 107 F.3d at 1240-1241. There is nothing in the statute that appears to contemplate such an odd dynamic. Moreover, it would run counter to the first clause in § 107(a). *See* 42 U.S.C. § 9607(a) (liability is subject "only" to the defenses in § 107(b)).

[17] As best we can determine, the Government first made this argument in the amicus brief it submitted to the Seventh Circuit last May in *Metropolitan Water, supra*. *See* 2006 WL 1354188, Brief of the United States as Amicus Curiae (May 1, 2006). The United States itself did not raise this argument in its brief to the Eighth Circuit below. *See* 2005 WL 3568541, Brief of the United States as Appellee (December 5, 2005).

the proposed rule set out the requirements for "response action by 'other persons' *(i.e., persons who are not the federal government, a state, or an Indian tribe*) . . ." (emphasis added). It also in significant tension with an EPA regulation providing that cleanup actions taken by those to whom EPA has issued unilateral orders under § 106(a) shall be deemed to be consistent with the NCP for purposes of any cost-recovery actions they may bring against other PRPs. 40 C.F.R. § 300.700(c)(3)(ii). On its face, this regulation contemplates that order-recipients are eligible to bring cost-recovery actions under § 107(a)(4)(B). As the Government may issue these orders only to liable parties, its current interpretation of the "any other person" language would render this regulation a virtual nullity.[18]

Lastly, the Government's reading flouts the purposes of both CERCLA in general and § 107(a)(4)(B) in particular. When it first passed CERCLA, Congress had two interrelated goals: to promote cleanup and to "assur[e] that those who caused chemical harm bear the cost of that harm. . . ." S.Rep. N. 848, 96th Cong., 2d Sess., at 13 (1980); *see also United States v. Olin Corp.*, 107 F.3d 1506, 1514 (11th Cir. 1997) ("*Olin*") (citing "Congress's twin goals of cleaning up pollution . . . and of assigning responsibility to culpable parties").[19] With respect to promoting cleanup, Congress wanted to supplement the government's efforts by "induc[ing] . . . potentially liable persons to pursue appropriate environmental response actions voluntarily." H.R. Rep. No. 1016, 96th Cong. 2d Sess., Pt. 1, at 32 (1980); *see also* S.Rep. No. 848, *supra*, at 31 (1980) ("This liability standard is intended to induce potentially responsible persons to voluntarily mitigate damages rather than simply rely on the Government to abate hazards"). Moreover, in the context of private-party cleanups, the purposes of promoting cleanup and imposing the costs on those responsible were linked. As this Court recognized in *Key Tronic*, the purpose of providing for private cost-recovery was "to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic*, *supra,* 511 U.S. at 819, n.13.

Given the above, it is unsurprising that no court has ever embraced the Government's "other person" argument. Even more tellingly, despite arguing that its interpretation leaves § 107(a)(4)(B) with "substantial operative effect," U.S. Brief, at 15, the Government fails to cite a single case in which a landowner (or anyone else) has filed and successfully prosecuted an action under its reading of that provision.[20] This Court has consistently rejected the

---

[18] It is possible that EPA could issue a unilateral order to one whom it believed to be liable, but whom a court ultimately might deem not to be so. *See*, *e.g.*, 42 U.S.C. § 9606(b)(2). There is no indication, however, that EPA was thinking about such a small subset of unilateral order recipients when it promulgated 40 C.F.R. § 300.700(c)(3)(ii).

[19] The Government concedes these were Congress's goals when it passed SARA. *See* U.S. Brief, at 2.

[20] For its first two examples the Government quotes dicta from *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 861 (7th Cir. 1994) ("*Akzo*"). U.S. Brief, at 16 (quoting from *Akzo*, 30 F.3d at 764). For its third, it merely cites statutory language. *Id.* As mentioned in n.12, *supra,* our research has identified one case in which an allegedly non-liable cleanup contractor was allowed to invoke § 107(a)(4)(B) in a fashion that would conform with the Government's reading thereof. *See Ohm Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574

efforts of those who have sought to find elephants in statutory mouseholes. *Whitman v. American Trucking Ass'ns*, 511 U.S. 457, 468 (2001). Here, the Government seeks to reduce § 107(a)(4)(B) to a mousehole, where Congress wanted a door large enough for all who undertake voluntary cleanups. The Court should not sanction this evisceration of the statute.

2. SARA Confirms a Broad Understanding of Private-Party Cost Recovery for Those Who do Not Have Express Contribution Claims

A. Neither SARA nor its Legislative History Give Any Indication that Congress Was Narrowing § 107(a)(4)(B).

As this Court noted in *Cooper Industries,* when Congress passed SARA in 1986 it was legislating against a backdrop that included a unanimous body of case law upholding the right of those who themselves bore potential liability to seek cost recovery under § 107(a)(4)(B) in situations in which they cleaned up sites without governmental prodding:

> After CERCLA's enactment in 1980, litigation arose over whether § 107, in addition to allowing the Government and certain private parties to recover costs from PRPs, also allowed a PRP that had incurred response costs to recover costs from other PRPs. More specifically, the question was whether a private party that had incurred response costs, but had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs. Various courts held that § 107(a)(4)(B) and its predecessors authorized such a cause of action.

543 U.S. at 162 (citations omitted).[21]

As this Court also noted, there was less certainty regarding "whether a private party that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs":

> . . . As originally enacted in 1980, CERCLA contained no provision expressly providing for a right of contribution. A number of District Courts nonetheless held that, although CERCLA did not mention the word "contribution," such a

(5th Cir. 1997).

[21] The Government tries to downplay the significance of *Wickland, supra*, 792 F.2d 887, one of the cases this Court cited in *Cooper Industries*. *See* U.S. Brief, at 29. This attempt is unavailing. *Wickland* was decided before SARA was passed. Thus, the court focused not on whether Wickland had been sued, but instead on the defendant's argument that Wickland could not bring a cost-recovery claim because the Calif. Dept. of Health Services, which oversaw Wickland's remedial activities, was not acting as a "lead agency" under § 104(d) for that site. The court framed the issue as involving whether § 107(a)(4)(B) is available only to those who have undertaken cleanup "pursuant to a governmentally authorized [CERCLA] cleanup program." 792 F.2d at 891. For purposes of the issue in this case, however, the key point is that the court recognized the validity of Wickland's claim despite the fact that Wickland clearly was one who bore potential liability as the current owner of the property. *See id.* at 889 (indicating Wickland's ownership).

> right arose either impliedly from the provisions of the statute, or as a matter of federal common law. That conclusion was debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contributions in other federal statutes.

Id. at 162 (citations omitted); *see also United States v. Westinghouse Elec. Corp.*, No. No. IP 83-9-C, 1983 WL 160587 (S.D. Ind. 1983) (a pre-SARA case finding no right of contribution).

In passing SARA, Congress made no changes to the relevant portions of § 107. Instead, it left § 107(a)(4)(B) intact, preserving the private right of cost recovery in those who cleaned up sites without formal governmental prodding. Congress did, however, resolve the uncertainty regarding the availability of contribution. In § 113(f)(1) and (f)(3)(B), it created explicit contribution claims in those who either had been or were being sued under CERCLA, or had entered into settlements with either EPA or the States. *See* 42 U.S.C. § 9613(f)(1) and (f)(3)(B), respectively. Nothing in either of these subsections suggests that Congress intended them to operate in lieu of the rights previously conferred in § 107(a).

Given that SARA made no changes to § 107(a)(4)(B), it is unsurprising that it has no legislative history bearing directly on that provision. Significantly, however, SARA does have legislative history bearing on the ability of those who bear potential liability under the statute to bring cost-recovery actions. Specifically, the House Energy and Conference Committee stated:

> [Section 113(f)] does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site.

H.R. Rep. No. 253, 99th Cong. 1st Sess., Pt. 3, at 79–80 (1985). Read fairly, this statement supports two important propositions: first, that the Committee agreed with the case law that one's potential liability should not preclude one from using § 107(a) to seek cost recovery; and second, that § 113(f) should not be read as eviscerating this authority.[22]

The other legislative history addressing § 113(f) indicates that it was intended to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the

[22] The Government, by contrast, draws two alternative inferences, either that "the Committee believed that a *private* PRP was not entitled to 'maintain a cause of action for cost recovery under Section 107' in the first place—or, at most, that any such action would not survive the enactment of § 113(f)." U.S. Brief, at 29. According to this logic, the Committee must also have been conveying implied messages about the absence of claims on the parts of States and tribes, for they similarly go unmentioned in this statement. This, of course, would flatly contradict the text of § 107(a)(4)(A), where States and tribes are on equal footing with the United States. It is much more likely that the Committee simply was focusing on the most prominent CERCLA plaintiff.

cleanup or cost that may be greater than its equitable share under the circumstances." S.Rep. No. 11, 99th Cong., 1st Sess., at 44 (1985); *see also* H.R.Rep. No. 99-253, *supra*, Pt. 1, at 79 (1985) (same). This quote addresses only the right of contribution under § 113(f), giving no hint that § 113(f) was intended to undermine § 107(a)(4)(B) in any way. Its narrow focus is confirmed by the fact that the quote speaks only to the rights of those who have been "held" jointly and severally liable under CERCLA, i.e., through a judicial action under either § 106 or § 107. The Government claims that, given the extant "uncertainty" regarding private rights of action, it is "peculiar" that Congress would have provided an express claim for contribution, but not a broader one for cost-recovery. U.S. Brief, at 29. The premise, however, is wrong. There was no uncertainty regarding whether CERCLA provided a private right of cost-recovery in those who undertook voluntary cleanup actions: § 107(a)(4)(B) provided it, and the courts unanimously had affirmed it. *Cooper Industries*, 543 U.S. at 163.

The legislative history of SARA thus confirms a simple narrative. Given the pre-existing cost-recovery right in § 107(a)(4)(B) and the judicial recognition thereof, Congress saw no need to reaffirm that right. In the contribution realm, by contrast, Congress sought to fill the statutory silence, and to respond to the uncertainty in the case law, by creating express rights in § 113(f). What little legislative history there is regarding the interrelationship between these new rights and the preexisting cost-recovery authorities confirms Congress' understanding that a party's potential liability should not preclude it from bringing a cost-recovery claim in appropriate circumstances.

B. The Lower Court Correctly Determined that § 107(a)(4)(B) Complements § 113(f)

The Government argues that even if § 107(a)(4)(B) could have been read to support a right of cost recovery in potentially liable parties before SARA was passed, it should now be read more narrowly in light of § 113(f). U.S. Brief, at 26. This argument is flawed in several respects. First, it assumes a level of ambiguity that, as noted above, is simply absent in § 107(a)(4)(B). Second, it ignores the fact that nothing in either the text or the legislative history of SARA indicates that it was intended to repeal § 107(a)(4)(B) in the vast majority of its preexisting applications. And third, and most significantly, it also ignores that §§ 107(a)(4)(B) and 113(f) are distinct and complementary.

Put most simply, the lower court correctly determined that the best way to harmonize §§ 107(a)(4)(B) and 113(f) is by reading the former to apply to those "who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107." *Atlantic Research*, 459 F.3d at 835; *see also Consolidated Edison*, 423 F.3d at 100. Thus, every private party that incurs response costs has a remedy against other PRPs under CERCLA; the only question is whether that claim arises under

§ 107(a)(4)(B) or, alternatively, under § 113(f). This reading is consistent with both the relevant text and legislative history.[23]

The Government claims that this reading places an "atextual limit on [the lower court's] already strained interpretation of [§ 107]." U.S. Brief, at 32. This argument misses the mark. While we are unaware of any pre-SARA cases addressing the claims of those who cleaned up sites pursuant to EPA consent decrees, we believe that, even then, the better view would have been that such entities had, if anything, implied claims for contribution, not claims for cost recovery. *See Sand Springs Home v. Interplastic Corp.*, 670 F.Supp. 913 (N.D. Okla. 1987) (the recipient of a unilateral order has an implied claim for contribution).[24] Put another way, before SARA, § 107(a)(4)(B) was at best ambiguous regarding whether it conferred a cost-recovery right on those who cleaned up sites pursuant to consent decrees;[25] however, it unambiguously provided such a right to those who engaged in voluntary cleanups. Seen in this light, Congress simply clarified through SARA that those who acted pursuant to consent decrees would be treated like their common law counterparts—their remedy would lie in contribution.

This harmonization of §§ 107(a)(4)(B) and 113(f) is also consistent with both *Branch v. Smith*, 538 U.S. 254 (2003) ("*Branch*"), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) ("*Brown & Williamson*"). *Branch* establishes that courts have a duty to reconcile a preexisting statute and any amendments thereto to the greatest extent possible. 538 U.S. at 273. *Brown & Williamson* teaches that:

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States*

[23] The correctness of this reading is most apparent in the context of voluntary cleanups, such as the one involved in this case. It is slightly more complicated in the context of those who have received unilateral orders under § 106(a) of CERCLA, given the similarity of the posture in which those parties find themselves as compared with that of traditional contribution plaintiffs. As discussed *infra* at pp. 429–30, the Court need not resolve this issue.

[24] Although this case post-dates SARA, it was decided without reference to those amendments.

[25] Despite the apparently unqualified language in § 107(a)(4)(B), this ambiguity could be found in the tension between its apparent breadth and well-settled notions of the common law. Under the common law, the claim one who has settled with another may have against third parties is in fact a "quintessential" claim for contribution. *See*, *e.g.*, Black's Law Dictionary 328 (6th ed. 1990) (defining contribution as the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion of which he ought to pay or bear"), and Restatement (Second) Torts § 886(a), cmt. b. (contribution "applies in favor of a tortfeasor who has paid more than his equitable share of the common liability in settlement, without any judgment or even suit against him"). This Court has indicated that it is sometimes appropriate for courts to imply exceptions in statutes based on common law traditions. *See*, *e.g.*, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) (implying common law defenses in 28 U.S.C. § 1983, despite its absolute language), and *United States v. Rogers*, 461 U.S. 677, 715 (1983) (Blackmun, J., dissenting) ("when broadly worded statutes . . . are in derogation of common-law principles, this Court has hesitated to heed arguments that they should be applied literally").

> *v. Fausto*, [484 U.S. 439, 453 (1988)]. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States v. Estate of Romani*, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it has not been expressly amended." [523 U.S. 517, 530–531 (1998)].

Brown & Williamson, 538 U.S. at 143. The Government cites many of these principles, U.S. Brief, at 26–27, but draws from them the wrong conclusion. Instead of reading §§ 107(a)(4)(B) and 113(f) in harmony, it would rely on § 113(f) to override the clear text of § 107(a)(4)(B) and strip it of virtually all practical effect. This is not the type of reconciling required under *Branch*.[26]

The Government makes four additional arguments based on the perceived structural tension between §§ 107(a)(4)(B) and 113(f). The Government first argues that allowing those who may be liable to seek cost recovery under § 107(a)(4)(B) would undermine the three-year limitations period for actions under § 113(f), as plaintiffs would invoke § 107(a)(4)(B) in order to take advantage of the more generous limitations period applicable thereto. U.S. Brief, at 30; *see also* 42 U.S.C. § 9613(g)(2) and (3). This is a valid argument for reading § 113(f) as providing those who have claims thereunder with their sole remedy under CERCLA.[27] It is not, however, a basis for reading § 113(f) as repealing § 107(a)(4)(B) in situations in which § 113(f) does not apply.

The Government next argues that allowing those who voluntarily clean up sites to pursue cost recovery would undermine CERCLA's contribution-protection scheme. U.S. Brief, at 31. There is less here than meets the eye. Section 113(f)(2) gives those who settle with either EPA or a State protection against "claims for contribution regarding matters addressed in the settlement," 42 U.S.C. § 9613(f)(2). However, the very text of this provision reveals that this protection was never intended to be all-encompassing. First, the protection only extends to "matters addressed in the settlement."[28] And second, it is unclear whether contribution protection applies to claims other than those based in contribution.[29] Moreover, once

---

[26] Even if this Court were to find that the text of §§ 107(a)(4)(B) and 113(f) cannot be harmonized, the better solution to this dilemma would be to create an implied exception in § 107(a)(4)(B), not to effectively repeal it. *See United States v. Novak*, 476 F.3d 1041, 1052, n.10 (9th Cir. 2007) (and cases cited therein).

[27] Both of the cases the Government cites in its brief involved plaintiffs who had entered into consent decrees with the United States, and thus came within the literal terms of § 113(f). *See United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), and *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997).

[28] Notably, the Government concedes that in some cases it would be unfair to characterize cleanup costs incurred by others as "matters addressed," and that the courts can review such characterizations as part of their fairness analysis when the signatories to any such settlements move to have them entered as consent decrees. EPA, Defining "Matters Addressed" in CERCLA Settlements, at 4-5 (March 4, 1997); *see also Akzo*, 30 F.3d at 767 (deeming work Akzo undertook prior to the entry of the relevant consent decree not to be a "covered matter" thereunder).

[29] To date, the courts have extended contribution protection to other common law claims,

EPA gets involved at a site, it can control what happens there. Section 122(e)(6) precludes PRPs from undertaking remedial steps without EPA's approval once EPA begins a "remedial investigation and feasibility study." 42 U.S.C. § 9622(e)(6); *see also E.I. DuPont De Demours and Co. v. United States*, 460 F.3d 515, 539, n.28 (3d Cir. 2006) ("*DuPont*").

The proper scope of contribution protection is not before this Court. The Government has provided no evidence, however, that allowing private-party cost recovery would seriously undermine its ability to settle cases. As a practical matter, § 122(e)(6) renders fanciful the specter of PRPs running amok, filing claims that disrupt EPA settlements.

Third, the Government maintains that any application of § 107(a)(4)(B) would allow potentially-liable plaintiffs to impose joint and several liability on other PRPs, in lieu of the equitable allocation contemplated under § 113(f).[30] As the court below correctly observed, however, the defendant can readily avoid this possibility by filing a counterclaim under § 113(f); by pleading and proving the plaintiff's liability, such a defendant can transform the relevant action into one in which equitable allocation applies. *See Atlantic Research Corp.*, 459 F.3d at 835; *see also Consolidated Edison*, 423 F.3d at 100, n.9. Indeed, the Government has conceded that this is how the statute works when it invokes § 107(a)(4)(A) despite its own potential liability at a given site. *United States v. Chrysler Corp.*, 157 F.Supp.2d 849, 860 (N.D. Ohio 2001) ("*Chrysler*"). There is nothing in the statute to suggest that the same dynamic could not also apply to private-party plaintiffs.[31]

Despite the Government's concession in *Chrysler* that counterclaims are a viable mechanism for addressing a plaintiff's potential liability under the Act, it here disparages that prospect by claiming that such an approach would require defendant PRPs to bear any so-called "orphan shares;" that is,

---

such as those based in indemnity. *See*, *e.g.*, *United States v. Cannons Eng. Corp.*, 899 F.2d 79, 92-93 (1st Cir. 1990). It is not clear, however, that the courts would do the same regarding statutory claims. If, for example, a State and EPA were to consecutively undertake remedial measures at a given site, there would appear to be nothing in § 113(f)(2) that would prevent EPA from seeking cost recovery from a PRP who had entered into an administrative settlement with the State for the State's earlier cleanup measures. Because EPA's claim would not be for contribution, it would be facially beyond § 113(f)(2)'s protection. This would be true even if the State settlement purported to cover the entire cleanup effort (*i.e.*, including EPA's remedial actions).

[30] Other courts have raised a concern that cost-recovery claims filed by those who may themselves bear liability are "quintessential" claims for contribution. *See, e.g.*, *Bedford Affiliates*, *supra*, 156 F.3d at 424. This, however, is untrue. Again, as would be the case in a tort action, those who engage in voluntary cleanups should be presumed to be non-liable until their liability has been pleaded and proved through the mechanism of a counterclaim. Read fairly, both Black's Law Dictionary and the Restatement (Second) of Torts support this idea. *See supra*, n. 25.

[31] Surprisingly, despite its embrace of this approach when it is a plaintiff, in this case the Government quotes a district court opinion for the proposition that the cost-recovery-buffered-by-a-counterclaim dynamic would result in "sequential, piecemeal litigation." U.S. Brief, at 38 (quoting from *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F.Supp. 662, 681 (S.D.N.Y. 1996)). The Government offers no reason why the courts are less capable of handling counterclaims than they are of handling contribution claims against third-party defendants (which are explicitly contemplated under § 113(f)(1)).

the shares of other PRPs who are not before the court (*e.g.*, because they may be either defunct or bankrupt). U.S. Brief, at 37–38. This is not the case. Once the defendant files its counterclaim under § 113(f)(1) and establishes the plaintiff's liability, that provision expressly instructs the court to equitably allocate the response costs among the liable parties before it. 42 U.S.C. § 9613(f)(1). As at least four Circuits correctly have recognized, this can include reallocating any orphan shares. *See Centerior*, *supra*, 153 F.3d at 354 (§ 113(f) allows the district court to "apportion the amount of the orphan shares among the parties"); *Browning-Ferris Industries of Illinois v. Ter Maat*, 195 F.3d 953, 957 (7th Cir. 1999) (explaining its holding with a hypothetical indicating the same); *Pinal Creek*, *supra*, 118 F.3d at 303 ("Under § 113(f)(1), the cost of orphan shares is distributed equitably among all PRPs, just as cleanup costs are"); and *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1135 (10th Cir. 2002) (courts may require even non-culpable PRPs to bear some portion of the orphan shares).[32]

The Government's fourth structural argument is that allowing cost-recovery claims would countermand the restriction that claims under § 113(f) may be brought only "during or following [a] civil action" under either §§ 106 or 107. U.S. Brief, at 32. This argument ignores that private cost-recovery actions arise under a separate statutory section, § 107(a)(4)(B). While the Government tries to support its theory by claiming that these are not wholly independent types of relief, *see id.* at 33, n.14, this Court has foreclosed that argument. *Cooper Industries*, 543 U.S. at 163, n.3 (deeming §§ 107(a)(4)(B) and 113(f) to be "clearly distinct"). Further, as the United States appears to concede, this argument vanishes if, as we argue, § 107(a)(4)(B) is unavailable to those who have contribution claims under § 113(f). U.S. Brief, pp. 32–33.

Finally, it is worth noting the Government's reading of § 107(a)(4)(B) would lead to a far greater structural problem than any the Government posits in its brief. Although this Court need not determine the nature of the claim, if any, that those who receive unilateral orders under § 106 may have against other PRPs, it seems likely that under the Government's interpretation they would have none.[33] This is so because, in all likelihood, EPA-issued unilateral orders under § 106 are not "civil action[s] under section 9606 . . . or under section 9607(a)."[34] If not, this would preclude the

[32] The other cases cited by the Government are not to the contrary. In *Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607, 612 (5th Cir. 2006), the Fifth Circuit acknowledged that equitable allocation is appropriate under § 113(f)(1). *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997), does not speak to the possibility of equitable allocation in a case in which § 113(f)(1) is in play; the quoted "strain[] logic" language addresses only the possibility of a liable plaintiff recovering 100% of its cleanup costs, *id.* at 1121.

[33] In this regard, this case is like *Cooper Industries*, in which this Court declined to address this issue. *See Cooper Industries*, *supra*, 543 U.S. at 167, n.5.

[34] Section § 122(g)(1) suggests as much by establishing a dichotomy between "administrative or civil action under section 9606 or 9607." 42 U.S.C. § 9622(g)(1). *See also BP America Production Co. v. Burton*, 127 S.Ct. 638 (2006) (deeming an administrative order not to be an "action" under the Mineral Leasing Act).

availability of a contribution claim under § 113(f)(1); additionally, the lack of a settlement would preclude any application of § 113(f)(3)(B); and finally, according to the Government, the order-recipient's likely status as a liable party would render § 107(a)(4)(B) unavailable. Thus, under the Government's reading, one who enters into either a judicial or administrative settlement with EPA would have a contribution claim under § 113(f)(3)(B), but one to whom EPA issues a unilateral order would have no claim at all.[35] It seems highly unlikely that Congress would intend for EPA's choice as to how to exercise its enforcement discretion to have such drastic consequences.[36]

3. CERCLA's Purposes Argue Strongly in Favor of Reading § 107(a)(4)(B) to Allow Those Who Voluntarily Remediate Sites to Seek Cost Recovery

As the Government concedes, CERCLA's central purposes are to promote cleanup at contaminated sites and to ensure that those deemed responsible bear the costs of those cleanups. U.S. Brief, at 2. And as this Court recognized in *Key Tronic*, in the private-party context these two purposes are linked. See 511 U.S. at 819, n.13 (noting that the purpose of providing for private-party cost recovery was "to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others").

The Government seems to believe that Congress sought only to promote "government sponsored cleanup" under government-sanctioned settlements. U.S. Brief, at 36–37 and 39. This view ignores both the text of § 107(a)(4)(B), which expressly allows any nongovernmental entity to recover response costs, and its legislative history. Additionally, it discounts the pre-SARA case law, the absence of any indication, textual or otherwise, that SARA intended to repeal private-party cost recovery, and twenty years of unanimous, post-SARA case law recognizing the right of private parties to bring these claims (albeit under various legal theories).[37]

---

[35] While a ruling in the Government's favor would lead to these consequences, a ruling affirming the lower court's result (*i.e.*, that those who voluntarily clean up sites have cost-recovery claims despite their own potential liability) would not necessarily imply that those who clean up pursuant to unilateral orders also have cost-recovery claims. Again, this Court need not reach that issue.

[36] The jarring nature of this anomaly is brought into focus when one considers that, given the frequent applicability of joint and several liability under CERCLA, *see*, *e.g.*, *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990), EPA often would have the power to issue a unilateral order requiring one out of perhaps dozens of PRPs to implement an entire remedy, even though these remedies often involve tens of millions of dollars in response costs. Under EPA's reading, the recipient of such an order would have no way to spread the costs of such a cleanup among the other jointly and severally liable parties. EPA's settlement leverage, which has always been great under the statute, *see*, *e.g.*, 42 U.S.C. § 9607(c)(3), will be truly breathtaking if it can threaten at any time to issue any jointly and severally liable PRP a unilateral order depriving it of any recourse against other PRPs.

[37] The first exception to this chain of case law was in *DuPont*, *supra,* 460 F.3d at 539, in which the Third Circuit became the only one of the four Circuits that have reconsidered the

In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of this Court recognized the vital role that private-party cleanups play under CERCLA:

> Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs involved from other potentially responsible parties.

Id. at 21–22.

By any measure, Congress's plan to promote cleanup by empowering proactive parties to spread some of the cleanup costs to other PRPs has been effective. According to our research, nearly 60 percent of the CERCLA cases litigated in the federal courts between 1995 and 2000 involved cleanups that the government would characterize as "unsupervised," U.S. Brief, at 39; *i.e.*, they were not the result of either government-generated lawsuits or judicial or administrative settlements of the type that would trigger either § 113(f)(1) or (f)(3)(B).[38] Even this Court has had significant exposure to such cases: *Key Tronic*, *Cooper Industries* and this case all involved cleanups that would not meet the Government's threshold.[39] The Government's interpretation would undermine CERCLA's cost-sharing goal in such cases.

Even this picture, however, does not begin to convey the full impact that CERCLA has outside of the realm of what the Government considers "supervised" cleanups. As the authors of a leading casebook have noted, while EPA and the States focus on the highest-priority sites, private parties often deal with smaller-scale contamination problems. Miller and Johnston, The Law of Hazardous Waste Disposal and Remediation, 2d ed., p. 564 (Thompson/West, 2005).[40] These private-party actions "have the effect of

cost-recovery issue since *Cooper Industries* to adhere to its earlier view denying these plaintiffs a claim. *Compare Atlantic Research*, 459 F.3d at 834-835, *Consolidated Edison*, 423 F.3d at 100, and *Metropolitan Water*, 473 F.3d 834-837.

[38] As indicated in n.12, *supra*, we reviewed all decisions CERCLA decisions reported in Westlaw that were decided between 1995 and 2000. We analyzed these decisions, which involved 364 contaminated sites, specifically to see whether a § 113(f)-triggering action had occurred. In 210 of the cases, one had not. This does not mean that these cleanups were unsupervised. In the majority of these cases, the party cleaning up the site had worked under the informal supervision of a State agency.

[39] *See Key Tronic*, 511 U.S. at 812 (Key Tronic was seeking, *inter alia*, $1.2 million for costs it had incurred without any consent agreement or lawsuit pending against it); *Cooper Industries*, 543 U.S. at 164 (Aviall had spent $5 million despite the absence of any "judicial or administrative measures to compel cleanup"); and *Atlantic Research*, 459 F.3d at 829 (Atlantic engaged in a voluntary cleanup).

[40] EPA can only undertake "remedial action" at sites that are on the National Priorities List, a list of the most contaminated sites in the country. See 40 C.F.R. § 300.425(b). There are

dramatically expanding the scope of the CERCLA program." *Id.* at 563. While responsibility for the vast majority of these cleanups may be resolved without resort to litigation, CERCLA still drives them; the underlying threat of a CERCLA action is what typically convinces those responsible to come to the table. As the author of the leading environmental treatise wrote 13 years ago,

> . . . In thirteen short years, [CERCLA] has thoroughly revolutionized commercial property management and exchange in the United States. More than any other single enactment, section 107 has brought environmental law into the blue-ribbon law firms of every major city. In no small way, this statute has transformed the practice of environmental law from fringe novelty to mainstream reality.

William H. Rodgers, the Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology, 27 Loy. L.A. L. Rev. 1009, 1012 (1994).

The Government's reading of § 107(a)(4)(B) would thwart both of CERCLA's central purposes. By reducing the ability of private parties to spread the costs of their potential cleanup measures among other responsible parties, the Government's interpretation would dramatically reduce their incentive to engage in these cleanup activities, and fewer cleanups would occur. Where private parties did voluntarily undertake cleanup measures, the Government's interpretation would preclude them from requiring others to bear their fair share of these cleanup obligations.

Of the four Courts of Appeal that have reconsidered private-party cost recovery in the wake of *Cooper Industries*, three, including the court below, have reversed course to find that even potentially-liable parties have such claims. *See Atlantic Research*, 459 F.3d at 834–835, *Consolidated Edison*, 423 F.3d at 100, and *Metropolitan Water*, 473 F.3d 834–837; *but see DuPont*, 460 F.3d at 539. The courts have taken this remarkable step because, upon reconsideration, they have realized that the existence of such a right is both commanded by the statute's language and fully consistent with its purposes. As a matter of first impression, this Court should reach the same conclusion.

currently approximately 1,246 sites on the NPL. *See* http://cfpub.epa.gov/supercpad/cursites (search conducted on April 2, 2007). By contrast, there are an estimated 130,000 to 425,000 potential sites contaminated with hazardous waste. *See* U.S. General Accounting Office, *Extent of Nation's Potential Hazardous Waste Problem Still Unknown* 3 (Dec. 1987).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
Jerry S. Phillips
Counsel of Record
Loeb & Loeb LLP
10100 Santa Monica Boulevard,
Suite 2200
Los Angeles, CA 90067-4120
(310) 282-2228

TABLE OF AUTHORITIES

CASES

STATUTES

APPENDIX

Description of *Amici Curiae*

The Natural Resources Defense Council is one of the nation's leading environmental organizations, with 1.2 million members and supporters. Its mission is to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends.

Craig N. Johnston is a professor of law at Lewis & Clark Law School, where he teaches courses in environmental law and hazardous waste law, among other courses. Prof. Johnston also has coauthored casebooks in both of these subject areas.

William F. Funk is a professor of law at Lewis & Clark Law School, where he teaches environmental law and other courses. Prof. Funk has coauthored casebooks in both environmental law and administrative law.

Martha L. Judy is an associate professor of law at Vermont Law School, where she teaches courses on CERCLA and other hazardous waste related matters. Professor Judy also directs the law school's Superfund Project.

Nina A. Mendelson is a professor of law at the University of Michigan, where she teaches environmental law, among other courses. Prof. Mendelson's other research and teaching interests include administrative law, statutory interpretation, and the legislative process.

Jeffrey G. Miller is a professor of law at Pace Law School, where he teaches numerous environmental courses, including one on hazardous waste law. He has also coauthored a casebook on hazardous waste law.

Patrick A. Parenteau is a professor of law at Vermont Law School, where he directs the school's Environment and Natural Resources Law Clinic. Prof. Parenteau also teaches many courses, including one on environmental litigation.

Zygmunt J.B. Plater is a professor of Law at Boston College Law School, where he teaches many course on environmental law. Prof. Plater has also coauthored a casebook on environmental law.